In the Supreme Court
OF THE
United States

OCTOBER, 1954

No. 19

NATIONAL UNION OF MARINE COOKS & STEWARDS, a voluntary association,
Petitioner,

vs.

GEORGE ARNOLD, et al.,
Respondents.

BRIEF FOR PETITIONER.

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OPINION BELOW.

The order of the Supreme Court of the State of Washington dismissing petitioner's appeal (R 53) is unreported.

JURISDICTION.

The judgment of the Supreme Court of the State of Washington was entered on July 3, 1953 (R 53).

The order denying petitioner's timely petition for rehearing was entered on August 19, 1953 (R 56). On November 6, 1953, Mr. Justice Douglas entered an order extending the time for filing a petition for a writ of certiorari to January 16, 1954 (R 60). The petition was filed on January 11, 1954, and was granted on March 8, 1954 (347 U.S. 916), at which time the case was transferred to the summary docket (R 61). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).[1]

CONSTITUTIONAL PROVISIONS INVOLVED.[2]

This case involves the Fourteenth Amendment to the Constitution of the United States which provides, as pertinent here:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[1]The federal questions presented here were raised by respondents' original motion before the Supreme Court of the State of Washington to dismiss petitioner's appeal from a money judgment. Petitioner interposed its claim for federal constitutional protection in the very first document filed thereafter (Petition, 2-3). Under the circumstances, the claim was timely (*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673; *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358).

[2]We reverse the hitherto usual order of this and the following heading because that appears to be required by Rule 40 of the Revised Rules of this Court, effective July 1, 1954.

QUESTION PRESENTED.

The Court below dismissed, without a hearing on the merits, petitioner's appeal from a judgment rendered against it in the sum of $475,000. This dismissal was ordered solely because of petitioner's failure to deliver to a receiver almost $300,000 worth of bonds and thereby to "purge" itself of a contempt order.

The question presented is whether it was either a deprivation of petitioner's property without due process of law or a denial to it of the equal protection of the laws, each guaranteed to it by the Fourteenth Amendment to the Constitution of the United States, for the Court below to dismiss the appeal solely because petitioner had not purged itself of contempt in the manner indicated.

STATEMENT.

On September 4, 1951, respondents (95 in number) each recovered a judgment against petitioner—a trade union—and its local agent for $5,000, a total judgment of $475,000 (R 1-8). The action a libel suit, arose out of the alleged "blacklisting", by petitioner's agent, Joseph Harris, of respondents following their "desertion" from the union and their attempts to form a rival union.[3] Appeals from this judgment were duly perfected (R 9).

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[3]The National Labor Relations Board found the blacklist to have been a violation of Section 8(b)(1)(A) of the Labor Management Relations Act of 1947 (29 U.S.C.A. 158) and ordered reinstatement and back pay (*Pacific American Shipowners Association, et al.*, 98 NLRB 582).

Thereafter, in supplemental proceedings, respondents obtained orders from the trial Court adjudging petitioner in contempt for failure to deposit over a quarter of a million dollars in bonds with a Court-appointed receiver (R 9, 14).[4] On the basis of this adjudication respondents immediately moved to dismiss the appeals in the principal case (R 11). The Court below ordered these appeals stricken from its calendar pending a determination of petitioner's appeal from the contempt adjudication (R 23-24).

In its opinion affirming the contempt adjudication (*Arnold v. National Union of Marine Cooks, etc.*, 42 Wn. 2d 648), the Court below ordered petitioner to purge itself of the contempt upon pain of the dismissal of its appeal in the instant case.

> "The adjudication of contempt is affirmed, and the appeal presently pending in the main action shall be dismissed unless, within fifteen days from the date of the remittitur herein, the appellant union purges itself of the order of contempt, by complying with the trial court's order requiring the delivery of the bonds to the receiver." (42 Wn. 2d at 654.)

Thereafter, without delivering the bonds to the receiver, petitioner filed a motion to docket the appeal pending in the main action (R 41), and at the same time respondents renewed their motion to dismiss it

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[4]The contempt adjudication was ultimately affirmed on appeal (*Arnold v. National Union of Marine Cooks, etc.*, 42 Wn. 2d 648), and this Court dismissed a subsequent appeal for want of a substantial federal question (*National Union of Marine Cooks, etc., v. Arnold*, 346 U.S. 881).

(R 44). After argument the Court below denied petitioner's motion to docket the appeal and granted respondents' motion to dismiss (R 52) and entered an order of dismissal "because of its [petitioner's] failure to purge itself of contempt of Court" (R 53). A petition for rehearing was duly filed (R 53-56) and was denied (R 56), and a formal judgment and remittitur was entered (R 57-58).

SUMMARY OF ARGUMENT.

Petitioner was deprived of its property without due process of law by the dismissal of its appeal from a $475,000 judgment solely because of its failure to satisfy or supersede the judgment. Contrary to the applicable statutes and to its own rules and decisions, the Court below dismissed petitioner's appeal without a hearing on the merits because of a contempt grounded upon a refusal to satisfy or supersede the judgment.

Such action is contrary to the rationale of the decisions of this Court and of the Courts of Appeal. *Hovey v. Elliott*, 167 U.S. 409; *Deauville Associates v. Eristavi-Tchitcherine*, 173 F. 2d 745; *Duell v. Duell*, 178 F. 2d 683. Nor can it be supported on the basis of such cases as *Hammond Packing Co. v. Arkansas*, 212 U.S. 332, wherein a default was taken for failure to testify and produce evidence.

Since the failure to deposit the funds afforded no rational basis for drawing an inference of lack of

merit in the appeal, it would be a deprivation of property without due process of law to permit such a presumption to operate here. *Manning, v. Mutual Life Insurance Co.*, 100 U.S. 693; *Maggio v. Zeitz*, 333 U.S. 56.

Furthermore, by singling out petitioner for special treatment, the judgment below denies to it the equal protection of the laws. *Yick Wo v. Hopkins*, 118 U. S. 356; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673; *Cochran v. Kansas*, 316 U.S. 255.

ARGUMENT.

THE ORDER DISMISSING ITS APPEAL DEPRIVED PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIED TO IT THE EQUAL PROTECTION OF THE LAWS, CONTRARY TO THE PROVISIONS OF THE FOURTEENTH AMENDMENT.

I.

THE APPEAL WAS DISMISSED SOLELY TO PUNISH PETITIONER FOR FAILURE TO SATISFY OR SUPERSEDE THE JUDGMENT.

There can be no argument but that the appeal to the Supreme Court of the State of Washington was dismissed and the judgment for $475,000 against petitioner was affirmed without any consideration of the merits because, and only because, petitioner did not purge itself of contempt of the trial court. Nor can there be any argument but that the only contempt involved was the failure to deliver up the bonds to a receiver (R. 9-10, 13, 14-15). Petitioner was thus *pun-*

ished for its failure to deliver up the bonds. No other conclusion is possible.

The order of dismissal recited:

> ". . . it appearing to the court that heretofore the appellant union [petitioner] was adjudged in contempt of the Superior Court, and this court . . . having informed it that its appeal in this cause would be dismissed unless within fifteen days . . . the appellant union purged itself of the order of contempt by complying with the order of the Superior Court, and it further appearing to the court that the appellant union has not purged itself of such contempt by complying with such order within the time prescribed or at all,
>
> It is therefore ordered that the appeal . . . be and the same is hereby dismissed because of its failure to purge itself of contempt of court." (R 53).

The language used by the Court below in its opinion issued preceding the actual dismissal specified that the only way in which petitioner could "purge" itself was by "the delivery of the bonds to the receiver" (*supra,* p. 4).

This unequivocal language leaves no room for doubt that the dismissal of the appeal was intended to punish petitioner for its failure to deliver the bonds. Indeed, the insertion of this specific language into the "contempt" opinion issued preceding the dismissal can only be regarded as an effort to use the coercive power of the Court to compel the delivery of the bonds upon pain of dismissal of the appeal.

And the subsequent dismissal itself reflects the punishment actually imposed for the failure to comply with the order.

II.

SUCH A PUNISHMENT IS CONTRARY TO THE LOCAL STATUTES AND RULES.

The State of Washington has by statute granted to all litigants the right to appeal from money judgments.

> "Any party aggrieved may appeal to the supreme court in the mode prescribed in this chapter from any and every of the following determinations, and no others, made by the supreior court, or the judge thereof, in any action or proceeding: (1) From the final judgment entered in any action or proceeding . . ." (Revised Code of Washington [hereinafter cited RCW] 4.88.010.)[5]

The State of Washington requires its Supreme Court to hear all such appeals on the merits.

> "The supreme court shall hear and determine all causes removed thereto in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities, and shall upon the hearing consider all amendments which could have been made as made." (RCW 4.88.280.)

The State of Washington has enumerated, as it constitutionally might (cf. *McKane v. Durston*, 153

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[5]The rules of the Supreme Court of the State of Washington are to the same effect (Rules on Appeal 14, 34A Wn. 2d 20).

U.S. 684; *Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S. 74), the grounds upon which an appeal may be dismissed, but significantly it has not specified a contempt of Court as one of them.

> "Any respondent may move . . . to dismiss an appeal either on the ground that the court has no jurisdiction of an appeal . . . or that the notice of appeal was not served or filed within the time limited by law, or is insufficient, or that the appeal bond was not filed within the time limited by law, or is not in form or substance such as to render the appeal effectual, or that the appellant's record on appeal has not been sent up, or that the appeal has not been diligently prosecuted or on any ground going to the merits of the further prosecution of the appeal, or on any two or more of the grounds herein mentioned . . ." (RCW 4.88.150.)[6]

On the contrary, the legislature of the state has carefully specified the punishments which may be imposed for contempt and has not included the dismissal of an appeal as one of them.

> "Upon the evidence so taken, the court or judicial officer shall determine whether or not the defendant is guilty of the contempt charged; and if it is determined that he is guilty, shall sentence him to be punished *as provided in this chapter.*" (RCW 7.20.090.)

The chapter referred to (Chapter 20 of Title 7 of the Revised Code of Washington) makes no provision

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[6]The rules of the Supreme Court of the State of Washington are to the same effect (Rules on Appeal 51, 34A Wn. 2d 55).

for the dismissal of an appeal as punishment for contempt.

The Court below, from an early date has held that the Courts of the state are limited by this statute with respect to the "amount" and "character" of the punishment which may be inflicted for contempt. (*In re Coulter,* 25 Wash. 526, 529.)

III.

THE DISMISSAL OF THE APPEAL IN THIS CASE RAISES A FEDERAL CONSTITUTIONAL QUESTION.

Although the interpretation of its statutes and rules is a matter usually reserved to the judgment of a state Court, a federal question is raised if such an interpretation deprives a person of property without due process of law. In such a case a question for this Court's consideration is properly presented.

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court. . . . But, while it is for the state courts to determine the adjective as well as the substantive law of the state,

> they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."
>
> *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, at 680-82.[7]

So, here, the judgment below cannot be insulated from this Court's scrutiny on the theory that it involves simply a matter of state appeliate procedure. The denial of the right to be heard on appeal, otherwise universally granted in Washington, raises a federal question of the highest significance. This is particularly so where as here, the denial was based upon petitioner's failure to purge itself of a contempt not related in any manner to the merits of the cause.

IV.

THE DISMISSAL OF ITS APPEAL DEPRIVED PETITIONER OF A RIGHT TO DEFEND ITS PROPERTY IN THE STATE COURTS.

This case presents an issue left open in *Hovey v. Elliott*, 167 U.S. 409, in which the Supreme Court of

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[7]Cf. *Cochran v. Kansas*, 316 U.S. 255, 258, where the case was remanded to the State Court for further proceedings because of an undenied claim that "Kansas refused him privileges of appeal which it afforded to others", and *Galloway v. Dowd*, 347 U.S. 1017, where, although the petition for certiorari was denied, the ruling was made expressly "without prejudice to petitioner to initiate a new proceeding alleging refusal [of the state court] to allow an appeal."

the District of Columbia had ordered an answer stricken and judgment by default entered against a defendant for his failure to comply with an order to transfer funds to a receiver. This Court, after an exhaustive examination of the pertinent authorities, affirmed the decision of the New York Court of Appeals which had refused to give full faith and credit to the default judgment.

The precise issue before the Court was:

> ". . . whether a court possessing plenary power to punish for contempt, unlimited by statute,[8] has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court." (167 U.S. at 413.)

This Court concluded that

> ". . . analysis . . . conclusively establish[es] that there is no basis for the assertion that the Courts of Chancery in England claimed or exercised the power, after answer filed, to decree *pro confesso* on the merits against a defendant, merely because he persisted in disobedience to an order of the court, though the cases do show that the Chancery Courts commonly refused to hear a defendant in contempt when asking at their hands a favor. The difference between the want

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[8]See *supra*, pp. 9-10, where are set forth the statutes, rules and decisions limiting the punishments which may be imposed for contempt in the State of Washington.

> of power, on the one hand, to refuse to one in contempt the right to defend in the principal case on the merits, and the existence of the authority, on the other, to refuse to accord a favor to one in contempt, is clearly illustrated by the whole line of adjudicated cases." (167 U.S. at 423-24.)

Adverting to the problem specifically raised herein, this Court noted, quoting from *McKane v. Durston*, 153 U.S. 684, 687, that:

> " 'An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions[9] allowing such appeal.' " (167 U.S. at 443-44.)

And, immediately thereafter, this Court reserved opinion on the merits of the instant situation:

> "Whether in the exercise of its power to punish for a contempt a Court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defence, and where the one in contempt was an actor invoking the right allowed by the statute, is a question not involved in this suit." (167 U.S. at 444.)

The dismissal of petitioner's appeal here solely because of a failure to comply with an order to satisfy a substantial portion of the judgment appealed from

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[9]See *supra*, pp. 8-9, where the statutory provisions and Court rules respecting the right of appeal, relevant to the instant case, are quoted.

by posting bonds with a Court appointed receiver cannot be reconciled with the rationale of *Hovey v. Elliott.*

Concededly, *Hovey v. Elliott* did not involve the precise question here presented.[10] However, there seems to be no sound basis for failing to apply its reasoning here. The thrust of the decision appears to be that while the due process clause does not require the Courts "to accord a favor to one in contempt", it does require that before the property of a contemnor is taken he must be afforded "the right to defend in the principal case on the merits" (167 U.S. at 423-24).

Here there is no question of a "favor". As we have seen, the State of Washington by statute and court rule grants to all litigants the right to appeal from money judgments and its Supreme Court is required to hear all such appeals on the merits without any

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[10]Research has revealed only one case involving a motion to dismiss an appeal pending an adjudication of contempt. In *Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 F. 825 (CA 9, 1910), appellant had been adjudged an involuntary bankrupt upon a petition filed by its creditors; an appeal had been taken; and respondents moved to dismiss it upon the ground, *inter alia*, that "proceedings for contempt have been brought against the officers and attorneys of the [appellant], and pending such proceedings they are not entitled to any relief . . ." (177 F. at 834). The court denied the motion to dismiss the appeal (id.), citing from Beach on Modern Equity Practice:

> ". . . but the rule applies to matters of favor, and a party, although adjudged in contempt, may be heard on matters of strict right."

and from *Brinkley v. Brinkley*, 47 N.Y. 40:

> ". . . a party in contempt . . . will not be permitted to ask for a favor of the court, nor to take any aggressive proceedings against his adversary, but . . . it is his right to take measures to protect himself . . ."

reference to whether or not the appellant is in contempt.

The rationale of *Hovey v. Elliott* therefore applies with the greatest of force to this situation. For a judgment may be equally invalid whether it be granted by default in the first instance, or whether it be affirmed by default subsequently. In either case, a right to defend is destroyed and the party is deprived of his property without due process of law.[11]

Hovey v. Elliott has recently been followed *(Duell v. Duell,* 178 F. 2d 683 [CA DC, 1949]) and even extended to protect the right of intervention *(Deauville Associates v. Eristavi-Tchitcherine,* 173 F. 2d 745 [CA 5, 1949]). In the last cited case, the Court of Appeals said:

> "A litigant may be punished for contempt by fine or imprisonment, or both . . ., but the Court should not prescribe, as a means by which he should purge himself of such contempt, that its doors be closed to him in defense of either his liberty or his property." (173 F. 2d at 746.)

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[11]This is particularly true where, as here, the right to appeal is granted by statute. What would be the effect of a general statute authorizing or directing the dismissal of appeals for contemptuous conduct, either in general or of specified varieties, is not a question presented in this case. Compare *District of Columbia v. Clawans,* 300 U.S. 613, with *Hammond Packing Co. v. Arkansas,* 212 U.S. 332.

V.

THERE IS NO RATIONAL BASIS FOR THE DISMISSAL OF THE APPEAL BECAUSE OF THE FAILURE TO TURN MONIES OVER TO A RECEIVER.

Citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, respondents suggest (Brief in Opposition, 8-9) that the failure to turn over almost $300,000 to a receiver represented such an admission that the appeal was without merit as to justify its dismissal. There are several obvious answers to this suggestion.

In the first place, petitioner was litigating the validity of the order adjudicating it in contempt, and that litigation was not finally determined until—months after the judgment here under review was entered—this Court on November 6, 1953, dismissed, for want of a substantial federal question, petitioner's appeal from the contempt adjudication (346 U.S. 881.[12]

In the second place, by the time the contempt litigation had become final, the funds in the amount required were no longer available (R 34-36), having been spent either in the usual course of petitioner's business or in order to meet "relentless and extreme attacks" upon petitioner by a rival union with which these respondents were associated (R 37).

But more important than either of these two is the fact that whatever the reason for the failure to com-

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[12]That the litigation was not frivolous is seen by the fact that at least one member of this Court was of the opinion that probable jurisdiction should have been noted and by the further fact that the entire Court denied respondents' motion for damages and double costs (*National Union of Marine Cooks etc. v. Arnold*, 346 U.S. 881).

ply with the trial Court's order to turn over funds, no analogy can be drawn between such conduct and a failure to comply with an order to produce material evidence. In the one case no rational inference can flow respecting the merits of the case; in the other, such an inference is quite permissible. And this is the basic difference between *Hovey v. Elliott* (on which petitioner relies) and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322.

In *Hammond* there was a state statute authorizing the striking of an answer upon the failure of a litigant to "appear and testify and produce any books, papers and documents . . ." (212 U.S. at 339, n. 1), "relating to the merits of any suit . . ." (212 U.S. at 336, n. 1).[13] Upon the defendant's failure to respond to the pretrial discovery proceedings instituted pursuant to the statute, its answer was stricken and a default judgment against it was entered. In affirming that judgment this Court placed great emphasis upon the reasonableness of a presumption that one who suppresses or conceals material evidence is likely to have no valid defense.

> "*Hovey v. Elliott* involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted

[13] As we have pointed out, there is no statute authorizing what was done here (*supra*, pp. 8-10).

right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause . . . [T]he generating source of the power was the right to create a presumption flowing from the failure to produce . . . In its ultimate conception, therefore, the power exercised below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law." (212 U.S. at 350-51).[14]

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[14]This basic difference between the *Hovey* and the *Hammond* cases has recently been recognized and restated: "The Hovey case holds it is a denial of due process to strip a defendant of his defenses as punishment for contempt. The Hammond opinion does not modify that rule; its holding is that, when a defendant has suppressed or failed to produce relevant evidence in his possession which he has been ordered to produce, a presumption arises as to the bad faith and untruth of his answer which justifies striking it from the record and rendering judgment as though by default." (*Duell v. Duell*, 178 F. 2d 683, 687.)

See the notes of the Advisory Committee on Rules respecting Rule 37, F.R.C.P.: "The provisions of this rule . . . authorizing judgments of dismissal or default for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with Hammond Packing Co. v. Arkansas . . . which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use as in Hovey v. Elliott . . . for the mere purpose of punishing for contempt."

See also *Peitzman v. City of Ilmo*, 141 F. 2d 956, 961 (CA 8, 1944), cert. den. 323 U.S. 718, reh'g. den. 323 U.S. 813.

This Court examined the prevailing opinions in the state Courts and noted how universally they supported the view it was taking,[15] and concluded:

> "As the power to strike an answer out and enter a default, conferred by [the statute] which is before us, is clearly referable to the undoubted right of the lawmaking authority to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation." (212 U.S. 353-54.)

Thus the inference of lack of merit in the defense was drawn solely from, and limited strictly to, the failure to produce material evidence. It was not sug-

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[15]Among the cases cited was *Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26, in which, many years ago, the Court below recognized the very distinction petitioner here urges between a punishment for contempt, on the one hand, and an inference of lack of merit in a defense arising from the failure to respond to discovery proceedings, on the other. That case involved a Washington statute similar to the Arkansas statute considered by this Court in the *Hammond Packing Company* case. In response to the argument that the striking of an answer and the entry of a default for failure to respond to interrogatories was a deprivation of property without due process of law, the Supreme Court of Washington said:

> "If the statute be construed as authorizing the striking of the answer and the taking of judgment by default, for failure to answer interrogatories, *solely as a punishment for contempt*, and without any regard to the substance of the interrogatories or the nature of the discovery sought, this objection would seem to be well taken." (44 Wash. at 32.)

The statute was sustained only upon the ground that a presumption of lack of merit could be indulged in upon failure "to make discovery of facts material to the support of the action or defense." (44 Wash. at 32-33.)

gested that such an inference would be permissible in the case of a contempt otherwise grounded. The inference in the *Hammond* case was permissible because there is a rational connection between a failure to produce evidence and a finding of lack of merit in a cause; the inference respondents seek to draw here, having no such rational basis in human experience, cannot be made without offending due process. *Manning v. Mutual Life Ins. Co.*, 100 U.S. 693; *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79; *Morrison v. California*, 291 U.S. 82; *Maggio v. Zeitz*, 333 U.S. 56.

VI.

THE ORDER DISMISSING ITS APPEAL DENIED TO PETITIONER THE EQUAL PROTECTION OF THE LAWS.

In addition to depriving petitioner of its property without due process of law, the order below denied to it the equal protection of the laws. As we have seen, the laws of the State of Washington require appeals to be heard on the merits and do not suffer them to be dismissed for contempt—certainly not of the kind here shown. For the State Supreme Court to single out petitioner for special punishment is to invade its constitutional right to equality of treatment.

A statute fair on its face may nonetheless be invalid if applied unfairly. *Yick Wo v. Hopkins*, 118 U.S. 356. And the state action which brings about the constitutional condemnation may be the action of judicial

as well as executive officials. *Shelly v. Kramer,* 334 U.S. 1. Indeed, a litigant may well be denied the equal protection of the laws by the unfair operation of the state's appellate procedure. Cf. *Patterson v. Alabama,* 294 U.S. 600; *Cochran v. Kansas,* 316 U.S. 255.

So, here, the singling out of petitioner for the drastic punishment imposed, the departure by the state Court from the rules normally applicable to other litigants, the ignoring, in this case, of its own statutes, rules and decisions by the State Court, all add up to a denial to petitioner of that equal protection of the laws which the Fourteenth Amendment guarantees to it. Cf. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.[16]

Dated, San Francisco, California,
August, 1954.

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(Appendix Follows.)

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[16]Although the only question now before this Court is whether the dismissal of its appeal deprived petitioner of the protections afforded it by the Fourteenth Amendment, and although on the merits the case is not presently here, it may be noted that the case against petitioners is far from concluded notwithstanding the affirmance of the judgment against its agent (*Arnold v. National Union of Marine Cooks and Stewards*, 144 Wn. Dec. 165).

Without presenting here the full argument which petitioner will make to the Court below, if it is permitted to do so, and the validity of which in the first instance must be passed upon by that Court, it may be observed that the recent decisions of this Court in *Garner v. Teamsters etc. Union*, 346 U.S. 485, and *Capital Service, Inc. v. NLRB*, 347 U.S. 501, raise serious questions respecting the jurisdiction of the State Court over the cause of action here.

The complaint here was based upon a claim that through its agent Harris, petitioner, a trade union, caused respondents to be

blacklisted by circulating to other unions letters charging respondents with having deserted the union. In passing upon the sufficiency of the complaint to state a cause of action for libel, the State Court observed:

> *"In the case at bar the letters in themselves would not be libelous if sent to the average individual. But, when we realize that they were sent to other unions which influenced or controlled the hiring of employees for work of appellants' usual occupation and that the names of all of the 97 appellants were attached to each letter, then the apparently harmless language takes on a more sinister meaning.* An official of a union influencing or controlling the hiring of employees would naturally become incensed when he received a letter containing a list of names of workers who, the letter charged, had deserted respondent union during the 1948 maritime strike and attempted to form a rival organization for the purpose of breaking the strike and destroying the union. *Although it is not directly suggested that these men be denied employment, the implication is clear."* (*Arnold v. National Union of Marine Cooks and Stewards,* 36 Wn. 2d 557, 562.)

However, as already indicated, *supra* p. 3, the National Labor Relations Board took jurisdiction over a charge alleging that this very blacklist constituted a violation of Section 8(b)(1)(A) of the Labor Management Relations Act (29 U.S.C.A. 158), so found, and issued a remedial order (*Pacific American Shipowners Association et al.*, 98 NLRB 582). The portion of the Board's decision and order relating to this matter is appended hereto for the information of the Court. The Board's order has been enforced by a consent decree of the Court of Appeals for the Ninth Circuit (*NLRB v. Pacific American Shipowners Association, et al.*, No. 13386, June 19, 1952).

Clearly, the *Garner* and *Capital Service* cases suggest that the Congress has preempted the field and that the State Courts have no jurisdiction over a cause of action, however entitled, based upon the interference with an employment relationship in interstate commerce. *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 657, at least leaves open the questions of whether the federal act's reinstatement and back pay provisions do not afford an exclusive remedy for interference with an employee's opportunity to obtain employment (347 U.S. at 665).

These questions, implicit in the demurrer filed by petitioner challenging the jurisdiction of the State Court over the subject matter of the action, are to be resolved in the first instance by the court below. They are adverted to here only to show that petitioner has a substantial argument to urge on its appeal—an argument it was never permitted to make because it was denied a hearing on the merits of its appeal.

Appendix

Excerpts from the decision and order of the National Labor Relations Board in *Pacific American Shipowners Association*, 98 NLRB 582:

"On April 11, 1949, Joseph C. Harris, port agent of the Seattle branch of the Respondent Union, sent a letter to Alaska Fishermen's Union (herein called AFU), which had a contract with with employers in the canning industry requiring union membership and clearance as a condition of employment, in which it referred to those named in an attached list as 'former members of the National Union of Marine Cooks and Stewards, who deserted this Union during the 1948 maritime strike and attempted to organize a dual organization under the leadership of the Sailors Union of the Pacific for the purpose of breaking our strike and destroying our Union.' It then impliedly suggested that those individuals be denied employment in the canning industry. Thereafter, several on this blacklist were unable to obtain work in the canning industry because of AFU's refusal, on account of the blacklist, to clear them.

"The Trial Examiner found, and we agree, that the Respondent Union violated Section 8(b)(1)(A) of the Act because of the black list which it sent to AFU. Section 7 of the Act guaranteed to those named in the blacklist the right to refrain from supporting the Respondent Union's 1948 strike activities, and to assist, instead, in the organizational activities of a labor organization of their choosing. As already found, several of those

individuals were deprived of employment as a result of the intervention on April 11 by the Respondent Union, because, having exercised the freedom of choice which Section 7 protects, they had fallen into disfavor with the Respondent Union. The rejection of their employment applications because of the Respondent Union's conduct made it unmistakably plain to the employees in question, and to the others named in the blacklist, that they must either regain good standing in the Respondent Union or forego opportunity for employment. In these circumstances, it is clear that the Respondent Union's effective blacklist restrained and coerced employees in the exercise of rights guaranteed by the Act. We accordingly find that the Respondent Union thereby violated Section 8(b)(1)(A) of the Act." (at 586) . . .

"Respondents [employers] . . . and National Union of Marine Cooks & Stewards, . . . shall jointly and severally make whole the employees named in Appendix A and Appendix B . . . for any loss of pay they may have suffered . . ." (at 614).

It is not insignificant that all but 5 of the 95 respondents here were parties to the Board proceeding and either received appropriate relief (98 NLRB 618-628) or had their cases dismissed because of failure of proof (98 NLRB 633).